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No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

BURNS SCOTT HOWARD,

Petitioner,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether it is per se reversible error for a Federal District Court in a Federal Employers' Liability Act action to instruct the jury, in direct contravention of this Court's decision in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), that it could *not* consider inflation when calculating future economic damages for the twenty-six year old totally disabled plaintiff.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

————o————

Burns Scott Howard hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

————o————

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit (App. 1, *infra*) is reported at 812 F.2d 282 (1987). The decision of the United States District Court for the Eastern District of Kentucky (App. 15-16, *infra*) is unreported.

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JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was decided and filed on February 17, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

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STATUTES INVOLVED

This action was brought under The Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, et seq. Section 1 of the Act, 45 U.S.C. § 51, provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

STATEMENT

On August 4, 1981, petitioner Burns Scott Howard suffered severe back, head and shoulder injuries that, according to his treating physicians, totally and permanently disabled him, at age 26, from *any* gainful employment.[1] His injury occurred when he and two fellow employees were working as "yard skatemen" in respondent Chesapeake & Ohio Railway Company's coal yard in Russell, Kentucky, and were required to "tie up" coal cars after they had been "humped." In lay terms, coal cars would roll down an incline, through "retarders" to slow their speed, and then down along the tracks to where the skateman would mount them and apply their brakes. (App. 2, *infra*) On the evening of petitioner's accident, the coal cars were coming down the track excessively fast and the artificial lighting in the area where the men had to work was inadequate, making it difficult to see the moving coal car in the dark. (App. 2-3, *infra*)

As petitioner was waiting for a coal car on his assigned track, the car suddenly appeared out of the darkness; he grabbed hold of it and was jerked off his feet and dragged along the tracks. Afraid to let go for fear of falling underneath the car, petitioner held on until he tripped on something and fell from the car. Petitioner was knocked unconscious from the fall, and the next thing he remem-

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[1]Plaintiff's injury occurred in the course and scope of his employment with the respondent railroad, and his exclusive remedy for these injuries was therefore under the Federal Employers' Liability Act, 45 U.S.C. § 51, et seq. Jurisdiction in the district court was based on 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1337 (federal statute regulating commerce).

bered was a co-worker walking up to him to see if he was hurt, a time period that was actually approximately 10 minutes. (TR. 54, 129-32)[2]

Petitioner subsequently saw numerous physicians for the back, left shoulder and head injuries he suffered when he fell from the coal car. Surgery was performed for petitioner's shoulder injury (App. 3, *infra*), but petitioner's lumbar disc injury was treated conservatively (TR. 240-41, 248, 251). His treating orthopedic surgeon testified at trial that both the shoulder and back injuries were permanent and disabled petitioner from "any gainful occupation." (TR. 257-58).

While petitioner's shoulder and back injury were themselves totally disabling injuries, his most serious injury by far was the brain damage he suffered in his fall from the coal car, when he was knocked unconscious. Petitioner was diagnosed with a post-traumatic syndrome, with major depression and anxiety. (App. 3, *infra*). As a consequence of this condition, petitioner suffered episodes of weeping, couldn't sleep, was estranged from people, and was not able to function sexually with his wife. Petitioner underwent extensive diagnostic testing to determine whether he had suffered brain damage, the most significant being the Luria Nebraska, which consists of 269 separate tests, each of which is a test of a specific micro behavior related to brain function. (TR. 287-95, 312, 319). Additional testing was performed using various "evoked potential" testing, and as a result of these tests, it was concluded that petitioner suffered a "dysfunctional damaged brain" that

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[2]TR. refers to the original trial transcript of proceeding.

affected the ability of his brain to process auditory and visual information. (TR. 324, 353-54, 378-79). Petitioner's physicians attributed his brain injury to his accident of August 4, 1981. (App. 3, *infra*)

Finally, it was the opinion of petitioner's treating physicians that he was permanently disabled from any occupational pursuit beyond a sheltered workshop type of situation, and further rehabilitation was impossible. (TR. 335-36).

The railroad responded to petitioner's medical evidence with two doctors who each saw petitioner solely for the purpose of testifying at trial. With respect to petitioner's left shoulder and low back injuries, the railroad's orthopedist thought petitioner's shoulder surgery had healed, that there were no residuals to the low back, and that from an *orthopedic* standpoint, petitioner was able to perform his work activities as a brakeman. (TR. 568-69). As a result of a Luria Nebraska test administered shortly before trial, the railroad's hired psychiatrist found that petitioner was *not* faking or exaggerating his injury (the opinion he had initially given) but *in fact* suffered from *brain dysfunction.* (TR. 401). However, this witness also testified to a laundry list of possible other causes of brain dysfunction (*none of which he examined for*) and he therefore concluded that petitioner's August 4, 1981 accident did not cause this brain dysfunction. (TR. 402, 406) (App. 3-4, *infra*) Still, the railroad's psychiatrist was of the opinion after his Luria Nebraska test that petitioner's I.Q. put him at the mental retardation level, and that his condition totally disabled him from *any* occupational pursuit. (TR. 417)

To prove the economic loss he suffered as a result of his total occupational disability, petitioner introduced the testimony of an economist, Dr. William E. Cobb, Ph.D., a Professor of Economics at the West Virginia College of Graduate Studies. (App. 4, *infra*) In calculating the present value of petitioner's future loss of earning capacity, Dr. Cobb used what is commonly referred to as the "real interest" method of analysis. Dr. Cobb explained how interest rates have closely paralleled inflation rates, and how historically the real interest rate has approximated one or two percent. (TR. 435). Dr. Cobb also explained the historical relationship between real interest and wage increases, and how wage compensation has historically stayed greater than inflation, about one or two percent. Looking at the historical wages of railroad workers and actual interest rates, Dr. Cobb determined that real compensation and real interest were almost completely offsetting. (TR. 436-37). Dr. Cobb then applied this analysis to reach two different estimates, a more liberal one assuming petitioner would work straight through to age 69, and the other, more conservative, taking into account the statistical possibilities of death or unemployment. Applying these two different assumptions, and taking into account the tax consequences of a lump sum award, Dr. Cobb reached two different present values. Using the assumption that petitioner would work straight through to age 69, Dr. Cobb calculated petitioner's economic loss at $2,784,540.00. Applying the more conservative approach, the present value of petitioner's after-tax loss equalled $1,705,475.00. (TR. 441-46) (App. 5, *infra*). To this future economic loss, Dr. Cobb added petitioner's wage loss between his August 4, 1981 accident and the time of trial, which totalled $101,380.00. (TR. 437).

With particular significance to the issue before this Court is Dr. Cobb's explanation of *inflation's impact* on petitioner's future economic loss. In his direct examination, Dr. Cobb explained how inflation, regardless of the particular percentage, is a *critical element* in calculating future loss.

> Q. And—Well, now, one thing would occur to the jury and to me, Doctor, and it's a standard question that I'm sure you are asked. When you say $1,705,475, what happens if you invest the money and how much interest can you earn if you put it in there at present safe rates? You would get a rather large figure. How can that represent his loss? Can you answer that?
>
> A. Yes. That is a question I am frequently asked, and, in fact, an issue I deal with quite frequently in my classes because it's a very easy mistake to make. If you assume, just for purposes, ten percent is not a bad rate. Right now if you invest in U.S. Treasury's you can get between eight and ten-and-a-half percent. So let's take ten percent which is a good round figure. If you invest $1,700,000 at ten percent, you would have $170,000 in interest a year. Your initial impression is. "Hey, $170,000 each year, every year if you invest at ten percent," and never touch the principal, that sounds like quite a windfall.
>
> Well, what that ignores is the fact that *inflation over the years eats into the principal and the interest.* Back to the chart that I had—if I can just remind you of that—what you can see from the chart is that over the long run, that ten percent interest is not going to be any greater than the wage increases you can expect. Historically, that's been true.
>
> I have taken into account the fact that you can earn high rates of interest, but only—*you can earn high rates of interest only in periods where there is high inflation.* That's always been true and always

will be true. *If there are periods of high inflation, then wages are going to be going up just as fast.* So, in effect, if you assume ten percent interest will be earned for 40 years—which I think is not a valid assumption—then you have to assume that wages are going to be going up probably ten percent too.

So it really doesn't make any difference whether you assume ten percent interest, or five percent interest, or 15 percent interest because *the major component of interest is inflation; and, in fact, if inflation is high, then wage growth will be high; if inflation is low, then wage growth will be low. Historically, that's been true.* ...

Q. So, are you saying eventually, *because of inflation and the wage pattern,* that the interest you invest will decline, that you will have to start biting into the principal?

A. That's exactly true; it's exactly the reverse of a home mortgage.

Q. Then if that—do you know about how far down the line that would be?

A. That happens about—after about 14 or 15 years.

Q. All right. Then from that year, from that period on to the end of his work life, would he be taking an even bigger bite into the principal?

A. An even bigger bite into the principal because in terms of purchasing power, the principal would be going down. Again, we're talking about what it will buy, not what the dollars are that remain. Ten years ago a dollar was worth considerably less—excuse me, more than it is today. So we're not concerned just what a dollar would be worth—will be in 40 years; *we're concerned with what the dollar will buy in 40 years.* (TR. 446-49) (emphasis added).

The railroad chose not to rebut Dr. Cobb's testimony with its own economist. Instead, its counsel, in his closing

argument, stated *his own analysis* of petitioner's future economic loss, an analysis which used the *market* interest rate and eliminated any effect of inflation.

> Now reasonableness: this man makes $16,000.00 a year, $16,237. What this means—*and the court will instruct you about this*—what that means is, how much money now invested in a good, safe security will give a return on that investment to justify it. If you believe Burns Scott Howard . . . then the key to it is that you give him the amount of money that would return $16,237. *Government bonds are returning about 10 1/2 to 11 percent; take 10 percent* . . . That means, ladies and gentlemen of the jury, that you would give him $150,000. Because that's about what it would—or give him $160,000.00, if you want to use a round number of 10 percent like we did the other day. He would get that money every year for the rest of his life; then when he died, he would still have $160,000 to leave to his wife and children. *This is what reduction of present worth means.* (Railroads closing argument, TR. 636-37) (emphasis added).

Over petitioner's objection (App. 8, *infra*) the trial court instructed the jury that it could *not* consider inflation in calculating future loss damages:

> In considering any element of damage to be experienced in the future, you are instructed that you should *not* take into account any possible effect o[f] present or future inflation one way or the other. (Court's Instructions, TR. 653) (emphasis added).

On July 23, 1985, the jury returned its verdict and found defendant negligent, petitioner free from contributory negligence, and assessed petitioner's damages at $100,000.00. (App. 8, *infra*). On July 31, 1985, petitioner filed a motion for a new trial on the basis that the trial court erred in instructing the jury that it could not

consider inflation in calculating future damages. (App. 8, *infra*) The defendant railroad made no post-trial motions. On November 8, 1985, the trial court, without issuing any opinion or memorandum, denied petitioner's motion, (App. 15, *infra*) and on December 4, 1985, petitioner filed his Notice of Appeal to the Sixth Circuit Court of Appeals. On February 17, 1987, the court of appeals affirmed the district court's denial of petitioner's motion for a new trial. (App. 1, *infra*)

The reasoning of the court of appeals was essentially a two-pronged approach. First, the court of appeals (noting a ruling by the trial court) appeared to suggest that plaintiff's economist had calculated an "obviously overblown estimate of damage," (App. 9, *infra*) and then explained why this may have accounted for the jury's verdict of $100,000.00.

> [I]t would not be surprising if the judge was reading his jury accurately when he intimated that the jury would think it absurd to award this plaintiff $1.5 million or more in respect of future earnings. The jury could have reasoned that if invested in long-term exempt municipal bonds paying 7% per annum, for example, a $1.5 million lump-sum award could be expected to yield more than $100,000.00 per year, and quite possibly leave plaintiff, at his death, still a millionaire (in dollars of the day) if he managed to avoid invading his capital for living expenses. In the Eastern District of Kentucky, at least, it will probably take a good many years of high inflation before most people will feel railroad hands cannot make do on less than $100,000.00 a year. (App. 9-10, *infra*)

Second, skirting the issue of whether the trial court's instruction not to consider inflation was error (App. 9, 10, *infra*), the court of appeals stated that it could have

"been potentially more confusing for the jury to be told it could take inflation into account than to be told otherwise," because of the "nature of the expert testimony" presented by plaintiff. (App. 10, *infra*) Referring only to that part of Dr. Cobb's testimony where he said that he "could not predict what the rate of inflation would be in the future" and that he "did not take inflation into account in projecting plaintiff's future earnings" (App. 10, *infra*), and having characterized Dr. Cobb as "having testified repeatedly that inflation made no significant difference," (App. 12, *infra*) the court of appeals relied on the fact that the trial court did not give a "reduction to present value" instruction (which the railroad requested in its jury instructions, but which was omitted by the trial court without objection by the railroad, (App. 8, *infra*) and stated:

> [W]e think it unnecessary to remand the case for a new trial in which the jury would be told both that it could take into account the possibility of future inflation and that projected future earnings must be discounted to their present value. Advice from the trial court as to these two countervailing considerations would have added little or nothing to the jury's deliberations, because plaintiff's evidence indicated that inflation and projected earnings is "washed out" by the inflation component of the interest rate used in present value calculations, and *inflation therefore makes no difference in the determination of the value of future earnings.* (App. 12-13, *infra*) (emphasis added)

Viewing the trial court's charge as permitting "the jury to award roughly 1.5 million dollars for future lost

earnings,"[3] the court of appeals stated it was not persuaded that the trial court's charge "entitles plaintiff to another shot at a higher verdict." (App. 14, *infra*)

———o———

REASONS FOR GRANTING THE WRIT

This writ should be granted because the court of appeals' decision represents a *complete departure* from the holding of this Court in *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523 (1983) that *inflation* is a *key element* in calculating future economic losses for an injured employee, and *must be considered* by the fact finder to ensure a fair and complete recovery. The Sixth Circuit's decision is a step backward, and now presents a *direct conflict* between that circuit and the rulings of this Court. With regard to the role of inflation in calculating petitioner's future damages, the trial court instructed the jury as follows:

> In considering any element of damage to be experienced in the future, you are instructed that you should *not* take into account any possible effect o[f] present or future inflation one way or the other. (Courts Instructions, TR. 653) (App. 8, *infra*) (emphasis added).

Petitioner timely objected to this instruction (App. 8, *infra*), and further raised this erroneous instruction as

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[3]Dr. Cobb testified that a rough approximation of his estimate of petitioner's estimated earning capacity could be made by multiplying his earnings in 1985 ($35,000) times his work life expectancy (43 years) (App. 6, *infra*). However, he also specifically testified he did *not* follow this approach. (TR. 437).

the sole issue in his motion for a new trial, which was denied by the trial court *without explanation* (App. 15, *infra*), and affirmed on appeal. (App. 1, *infra*).

It is difficult to discern the basis of the trial court's ruling inasmuch as it issued no memorandum explaining its decision. It is equally difficult to understand the Sixth Circuit's decision, as it represents not only a refusal to follow this Court's decision in *Jones & Laughlin,* but is contrary to its own decisions. Even though the role of inflation in determining future damages was much debated by the circuit courts before *Jones and Laughlin,* the *leading case* in the Sixth Circuit had already held (in an FELA case) that it was *reversible error* to instruct the jury that it could *not* consider inflation. *Bach v. Penn Central Transportation Company,* 502 F.2d 1117, 1122 (6th Cir. 1974). The trial court in *Bach* had excluded an economist's testimony on the precise wages the deceased employee would have earned in the future, and further charged the jury that it should *not* consider "future increases or decreases in the purchasing power of money." 502 F.2d 1122. The court of appeals upheld the trial court's exclusion of the economist's testimony on the *exact* future income the decedent would have received on the basis it was speculative, but, of prime importance here, held that the trial court committed *reversible error* in instructing the jury *not to consider inflation.*

> We do not hold, however, that the jury may never consider inflation and future increases in income in determining damages. Ideally, the damage award should compensate appellant for the financial loss she will suffer as a result of the death of her husband. If a jury is not permitted to consider decreases in the purchasing power of money, appellant would be woefully damaged if inflation should continue at its present or

> at any other substantial rate. Some consideration of probabilities is inevitable in any fair award of damages. The court's role is to keep such extrapolations within reasonable bounds and insure that they conform to the evidence. (Cite omitted)
>
> Even though no expert testimony on inflation and future increases was admitted, *it was still error* for the district court to charge the jury that it *should not consider 'future increases or decreases in the purchasing power of money.'* (Cite omitted) Inflation is a fact of life within the common experience of all jurors. Admittedly, if the jury considers this issue without expert testimony, their calculations will be even more imprecise. There is always a chance that the verdict may be too generous. *But if jurors should be prohibited from applying their common knowledge of inflation in reaching a verdict, the party entitled to recovery could be grievously under-compensated.* The court can always rectify an exorbitant verdict through its power of remittitur. 502 F.2d 1122 (emphasis added).

While it was thus clear error for a court in the Sixth Circuit to instruct a jury after *Bach v. Penn Central* that it could not consider inflation (as the trial court did here), *see, Morvant v. Const. Aggregates Corp.*, 570 F.2d 626 (1978), the full extent to which economic testimony could be introduced on the subject remained somewhat unclear in the Sixth Circuit and others. In 1983, this Court finally stepped into the picture and in the landmark *Jones and Laughlin* ruling, established the guidelines by which inflation should be considered in calculating future damages. Pointing to cases where consideration of inflation was disallowed on the basis it was speculative, this Court explained:

> *The effect of these holdings was to deny the plaintiff the benefit of the impact of inflation on his future earnings, while giving the defendant the benefit of*

> *inflation's impact on the interest rate that is used to discount those earnings to present value.* Although the plaintiff in such a situation could invest the proceeds of the litigation at an "inflated" rate of interest, the stream of income that he received provided him only with enough dollars to maintain his existing *nominal* income (emphasis in original); it *did not provide him with a stream comparable to what his lost wages would have been in an inflationary economy.* This inequity was assumed to have been minimal because of the relatively low rates of inflation.
>
> In recent years, of course, inflation rates have not remained low. There is now a concensus among courts that the prior inequity can no longer be tolerated . . . There is no concensus at all, however, regarding what form an appropriate response should take. 462 U.S. at 540-41 (emphasis added) (Cites and footnotes omitted).

This Court then engaged in an extensive analysis of the three prevailing economic theories by which inflation could be taken into account in fairly calculating lost future earnings. Under the first of these theories, the "real interest rate" approach (which was that applied by Dr. Cobb in the instant case), market interest rates (i.e. those that now hover somewhere in the 10 percent range) are assumed to include two components, an estimate of anticipated inflation and the desired "real" rate of return on investments—the real rate of return essentially constant over time. The effect of inflation on future increases in earnings are therefore perfectly offset by all but the "real" component of the market interest rate. 462 U.S. at 541-42.

Under the second of these theories, the "total offset" method (which is actually a number of similar theories using the same approach), the market interest rate is considered fully offset by future price inflation, and other sources of future wage increases. 462 U.S. at 544-46.

The third and final method uses market interest rates (i.e. the 10 percent range) to determine present value, but also permits evidence of what future price inflation will be in estimating the lost stream of future income. Under this approach, the actual estimates of future wage inflation are allowed. 462 U.S. at 543.

This Court in *Jones and Laughlin* declined to adopt any of these methods as the "exclusive method in all Federal trials for calculating an award for lost earnings in an inflationary economy", but instead chose only to "define the general boundaries within which a particular award will be considered legally acceptable." 462 U.S. at 547. While this Court gave approval to all three methods, it discouraged the method by which the actual market interest rate is used as the discount rate, and the trier of fact relies upon a specific forecast of the future rate of price inflation. Instead, it favored the "real interest rate" approach (using a rate between 1 and 3 percent) and the total offset approach. In each case, *inflation,* while not specifically predicted by percentage rate, *furnishes the primary basis for the offset.* 462 U.S. at 547-50.

This Court's most recent pronouncement on the significance of inflation in calculating future damages in FELA cases is found in *St. Louis Southwestern Railway Company v. Dickerson,* 470 U.S. 409 (1985). In *Dickerson,* the Missouri Court of Appeals refused to give the railroad's requested present value instruction, on the basis that no such instruction was required under Missouri state law. Reversing, this Court held that *federal* substantive law governs damages in FELA cases, and that under long-standing federal law, a defendant railroad is entitled to a present value instruction. Of critical importance to the

instant case, this Court referred to its decision in *Jones and Laughlin* and stated:

> Although our decision in *Jones and Laughlin* makes clear that no single method for determining present value is mandated by federal law and that the method of calculating present value *should take into account inflation* and other sources of wage increases as well as the rate of interest, it is equally clear that an utter failure to instruct the jury that present value is the proper measure of a damage award is error. 470 U.S. at 412 (emphasis added).

Thus, while this Court has not ruled that a particular economic theory must be used in calculating the present value of lost future earnings, each approved method has one common component—*the effect of inflation.* Subsequent federal circuit court decisions have followed *Jones and Laughlin's* lead, and held that inflation must be taken into account in one manner or another. In *Culver v. Slater Boat Company,* 722 F.2d 114 (5th Cir. 1983) (*Culver* II), *cert. denied* 467 U.S. 1252 (1984), 469 U.S. 819 (1984), the Fifth Circuit noted that the Supreme Court in *Jones and Laughlin* confirmed the Fifth Circuit's holding in *Culver* I, 688 F.2d 280 (5th Cir. 1982) "that the fact finder *should* consider inflation in determining an appropriate damage award." 722 F.2d at 117 (emphasis added). Similarly, in *Hunter v. Reardon Smith Lines, LTD,* 719 F.2d 1108 (11th Cir. 1983), *cert denied* 467 U.S. 1205 (1984), a longshoreman in a personal injury action against a ship owner was granted a new trial based on the trial court's refusal "to permit expert testimony or to instruct the jury regarding the effect of future inflation on the award of future damages." 719 F.2d at 1114.

Finally, in a FELA case where the trial judge *failed to instruct* the jury to consider inflation (as compared with

the trial court's instruction here that the jury could *not* consider inflation), the Second Circuit reversed and remanded for a new trial *limited* to the question of *damages*. *DeChico v. Metro-North Commuter Railroad*, 758 F.2d 856 (2nd Cir. 1985).

As a direct consequence of the trial court's instruction not to consider inflation, the jury had no choice but to *totally disregard* the testimony of petitioner's economist, Dr. Cobb, because inflation made up an integral part of his calculations. The jury was also thus instructed to totally disregard petitioner's closing argument to the jury on damages, in which his counsel, in reliance on Dr. Cobb's testimony, explained the effects of inflation. (Plaintiff's Closing Argument, TR. 642-43).

With inflation's impact *totally removed* from the jury's consideration by the trial court's instruction, it was left with *only* the 10 percent *market rate* of interest suggested by the railroad's counsel in his closing argument without also being able to consider inflation's effect on wages and prices:

> then the key to it is that you give him the amount of money that would return $16,237.00. Government bonds are returning about 10½ to 11 percent; take 10 percent . . . That means, ladies and gentlemen of the jury, that you would give him $150,000.00. Because that's about what it would—or give him $160,000.00, if you want to use a round number of the 10 percent like we did the other day. He would get that money every year for the rest of his life; then when he died, he would still have $160,000.00 to leave to his wife and children. This is what reduction of present worth means. (Defendant's Closing Argument, TR. 636-37).

In light of this Court's decision in *Jones and Laughlin*, it is obvious that the argument made by the railroad's counsel is a gross distortion of economic theory and highly misleading, so much so that it must be held unsound and contrary to *Jones and Laughlin* as a matter of law. Unfortunately, to a jury unsophisticated in basic economics, it may have some superficial appeal, and when viewed in conjunction with the trial court's instruction which eliminated the effects of inflation at the very heart of petitioner's economic testimony, it is certainly not surprising to see a jury verdict as low as was returned here.

The court of appeals unfortunately made this same mistake as the trial court, where it misinterpreted the modern economic theories explained by this Court in *Jones and Laughlin*. The court of appeals' mistake is best seen in their apparent misunderstanding of Dr. Cobb's testimony of petitioner's future wage loss, where the court implied that a 1.5 million dollar lump-sum award "could be expected to yield more than $100,000.00 per year and quite possibly leave plaintiff, at his death, still a millionaire (in dollars of the day), if he managed to avoid invading his capital for living expenses." (App. 9-10, *infra*) Dr. Cobb was very explicit in his testimony that *inflation* is in fact a *critical focus* of his calculations. He testified that inflation "over the year eats into the principal and the interest" and that you "can earn high rates of interest only in periods where there is high inflation." (TR. 447) According to Dr. Cobb's trial testimony, "*at the end of the work life there is zero dollars left.* That's the primary principle on which all the calculations are based." (emphasis added) (TR. 448).

The court of appeals' decision ultimately rests on its assumption that the trial court's instruction not to con-

sider inflation was balanced out by the lack of a present value instruction, and that the jury therefore *failed to discount to present value.* This ignores the fact that (as acknowledged by the court of appeals) the railroad argued that petitioner could invest his money at 10 percent per annum, and that an award of $160,000.00 would give petitioner $16,000.00 a year for life and still leave $160,000.00 for his family at his death. (App. 7, *infra*) However, Dr. Cobb's testimony clearly rejected this superficial and unsophisticated analysis, because a critical part of his calculations was that inflation was taken out of *both sides* of his calculations, both in calculating *future earnings* and in determining the *interest rate* to discount to present value. Taking inflation out of the earning side of the calculations (by virtue of the trial court's instruction) without *also* taking it out of the present value side of the instructions (by virtue of the inflationary component of the market interest rate) results in the exact unfair circumstance warned against by this Court in *Jones and Laughlin,* 462 U.S. at 540, where the railroad had the *benefit* of inflation by virtue of a high interest rate, a benefit *denied* to petitioner in his lost earning calculations. To put it a simpler way, the full brunt of inflation's impact was used *against petitioner* by the jury's use of a market interest rate riddled with inflation. With the court's instruction in mind, it is no wonder that the jury could conceivably (and erroneously) believe that $100,000.00 was in fact a fair and adequate award to petitioner for *all of his future damages.*

While it is not possible to determine the precise amount by which the jury's verdict undercompensates petitioner, there can be no question that it in fact does. Petitioner, only 26, has a 40 plus year work life expectancy, and

it cannot be said as a matter of law that the effects of inflation during this time will be insignificant. Indeed, the most important economic questions faced by courts today concern the proper manner of dealing with inflation in calculating future damages. The economic testimony presented here by Dr. Cobb fits squarely within that permitted by this Court in *Jones and Laughlin v. Pfeifer*, and it was reversible error for the trial court to strip away its very foundation by its instruction not to consider inflation.

Following *Jones and Laughlin, not a single case,* other than the instant one, has approved an instruction *not* to consider inflation. To allow the decision of the court of appeals to stand here invites other trial courts to instruct juries *not* to consider inflation. The effect would be to undermine *Jones and Laughlin,* and return the role of inflation in calculating future damages to the chaotic and confused environment that existed in the lower courts prior to *Jones and Laughlin.*

In summary, the trial court's instruction to the jury that it could not consider inflation in calculating future damages was a single error with enormous, incalculable consequences. Petitioner, at age 26 ,was permanently and totally disabled not only by a low back and shoulder injury, but more significantly, by brain damage that lowered his I.Q. to the level of mental retardation. At age 26, petitioner had one day in court; yet he was awarded damages by a jury that was *specifically instructed* not to take into account the *single most important factor* in fairly and accurately calculating damages for the rest of his life—that of inflation. Not only had the Sixth Circuit previously ruled that an instruction such as was given by the trial

court here is reversible error, but this Court has twice ruled in recent decisions that inflation is a *critical element* under *any* economic theory of computing future damages. It is impossible to reach any conclusion other than that this instruction resulted in a vastly diminished jury award to plaintiff, an error that can only be remedied by a new trial on the issue of damages.

More importantly, allowing the court of appeals' decision to stand will invite other courts to further undermine *Jones and Laughlin Steel Corp. v. Pfeifer*, and reintroduce to the calculation of future damages the confusion which *Jones and Laughlin* was intended to end.

CONCLUSION

Plaintiff therefore respectfully requests that this Court grant this Petition for a Writ of Certiorari and review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

Burns Scott HOWARD,

Plaintiff-Appellant,

v.

The CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant-Appellee.

No. 85-6106.

United States Court of Appeals, Sixth Circuit

Argued Oct. 16, 1986.

Decided Feb. 17, 1987.

Frank H. Warnock, Warnock and Warnock, Greenup, Ky., Ralph E. Koenig (argued), Minneapolis, Minn., Michael L. Weiner, for plaintiff-appellant.

Paul Hobbs (argued), Ashland, Ky., for defendant-appellee.

Before NELSON and RYAN, Circuit Judges, and ENSLEN, District Judge.

DAVID A. NELSON, Circuit Judge.

Dissatisfied with a $100,000 jury verdict he recovered in a Federal Employers' Liability Act action against the defendant railroad, plaintiff Burns Scott Howard has appealed the judgment entered on that verdict. Although the trial court declined to give a jury instruction requested by the defendant railroad to the effect that future earnings ought to be discounted to their present value, should the jury decide to award damages for loss of future earning capacity, plaintiff contends that the trial court nonetheless erred in instructing the jury to disregard the effect of inflation in considering any such award. Finding, on the particular record before us, no prejudicial error, we shall affirm the judgment.

I

Plaintiff Howard, who was 26 years old at the time of trial in mid-1985, was graduated from high school in 1977. He went to work for the railroad in the summer of 1978, and worked there full-time (except for periodic furloughs occasioned by economic conditions) until August 4, 1981, when he was allegedly injured in an accident. He did not work thereafter.

Plaintiff's evidence showed that on the night in question he was working as a "skateman" in a rail yard, where his job was to climb aboard moving coal cars and bring them to a stop by setting their handbrakes; that the cars were being sent down the classification tracks at an excessive rate of speed, the yard was not adequately il-

luminated, and the work area had debris in it; and that plaintiff lost his footing as he tried to climb aboard one of the cars, tripped over a piece of debris, and fell to the ground, injuring his left shoulder, arm and rib cage. Plaintiff was taken to the office of a trainmaster, who, after making a visual inspection for injuries, drove him to a nearby hospital. The hospital charts and accident reports filled out at the time indicated no loss of consciousness and no head injury; plaintiff seemed mentally alert, and the pupils of his eyes were not dilated. He subsequently contended, however, that the accident—which was not witnessed by anyone else—must have knocked him unconscious.

Plaintiff went home after having been seen in the hospital emergency room, but he was hospitalized two days later for back and shoulder pain. An orthopedic surgeon operated on his shoulder in May of 1982. By the summer of that year plaintiff was showing signs of mental depression. In January of 1983 a psychiatrist saw him and made a diagnosis of post-traumatic syndrome, with major depression and anxiety. In 1985 a neuropsychologist made a diagnosis of brain dysfunction; that diagnosis was subsequently confirmed by other experts, including a psychiatrist who examined plaintiff for the defendant railroad.

The evidence was in dispute as to whether the brain dysfunction diagnosed in 1985 could be said, with reasonable medical certainty, to have been caused by the accident plaintiff claimed to have suffered in 1981. Plaintiff's expert witnesses opined that there was a direct causal relationship, and the defendant railroad's expert denied that any such causal relationship relationship had been established. The defendant's expert testified that although

plaintiff's condition might possibly have been caused by a fall that knocked him out, the condition could also have been the result of intercerebral multiple sclerosis, Alzheimer's disease, a brain tumor, a blood clot, meningitis, infection, deoxygenation of the brain during general anesthesia, or various other causes that had not been ruled out. Plaintiff's lawyers argued to the jury that the brain damage was "the real thing in this case . . . the most devastating injury of all," and a major question before the jury was whether plaintiff had in fact shown that he suffered from brain damage caused by his alleged fall at work.

The defense presented testimony from a union official, one Frank Davis, to the effect that plaintiff had complained, several weeks before the alleged accident, of having hurt his left shoulder while doing farm work. Mr. Davis testified that there had been discussion of the possibility of plaintiff's receiving disability payments from the railroad on account of his shoulder condition, and that he (Davis) had made an anonymous telephone call to a railroad claim agent to suggest that plaintiff's claim was fraudulent. Mr. Davis' testimony was vigorously challenged on cross-examination, and other employees who were supposed to have heard the original conversation denied that it had taken place.

With respect to plaintiff's earnings prior to the accident, plaintiff did not disagree with records showing that his railroad wages (exclusive of the value of fringe benefits) had been $5,122 in 1978, $8,587 in 1979, $16,237 in 1980, and $9,969 in 1981. Through an economist, Dr. William Cobb, plaintiff presented evidence that the fringe benefits and wages lost thereafter up to the beginning of the month in which the trial was held, July of 1985, had

come to slightly over $100,000. The railroad made no significant attempt to suggest that this $100,000 actual earnings loss figure was not accurate.

Dr. Cobb also testified on what plaintiff's future earning capacity would have been had he not been permanently disabled at the time of trial. Dr. Cobb explained that he had attempted to estimate the future "real" wage increases that the plaintiff would have received over the course of a normal working career with the railroad, expressing those increases in constant 1985 dollars without any element of inflation. Dr. Cobb said he also attempted to determine the present value of that stream of future earnings, discounting the earnings at an unspecified "real" interest rate that might have obtained in an environment free of inflation and of any expectation of inflation. With adjustments for anticipated taxes on both the wages plaintiff could have been expected to earn if he had remained at work and the income he could be expected to receive on a lump sum damage award, and with further adjustments for what Dr. Cobb believed to be reasonable (but unspecified) assumptions as to life expectancy, furlough rates, risk of illness or job loss because of economic conditions, and so forth, Dr. Cobb testified that in his opinion the present value of the loss of future wages and fringe benefits experienced by a permanently disabled 26 year old railroad worker with the plaintiff's earnings history and seniority would be slightly over $1.7 million.

Asked on cross-examination if there was a prediction of future price inflation in any portion of his calculations, Dr. Cobb testified that there was only one place in his economic model where it had been necessary to use an estimate for inflation: that was in projecting the taxes on the in-

come from a hypothetical lump sum damage award. The inflation rate used in this connection, Dr. Cobb testified, was 7.24% per annum, carried out through the year 2028.

Dr. Cobb did not say what figure his economic model would have yielded had he assumed an inflation rate of zero, but he did testify that a rough approximation of the value of plaintiff's earning capacity could be arrived at by taking $35,000 a year (plaintiff's estimated wages plus fringe benefits for the first half of 1985 having come to about half that amount) and simply multiplying $35,000 by the remaining number of years plaintiff might have worked. Assuming, as Dr. Cobb invited the jury to do, that plaintiff would have worked 43 more years, this computation (43 X $35,000=$1,505,000) would peg the future earning loss at roughly $200,000 below the figure produced by the more sophisticated economic model. The jury could thus have inferred that if Dr. Cobb has assumed no inflation when he made his sophisticated present value calculation, he would have come up with an estimated earning loss of roughly $1.5 million as opposed to $1.7 million.

The reason inflation did not play a bigger part in Dr. Cobb's calculations, as he explained, was that in his view the market rate of interest appropriately used in making a present value calculation approximates the percentage rate at which wages can be expected to rise in the future. Inflation rates have historically been a major component of interest rates, Dr. Cobb said, and whatever assumptions are made about the course of future inflation, inflation should not be a significant factor in the calculation of economic loss: the inflation element in the present value caluculation offsets the inflation element in the calculation of future earnings. "[D]espite all the rigamarole of trying to

find what inflation is," he testified, "how much you discount it in terms of the interest that will be earned, almost all of that washes out." When asked, on cross-examination, if he claimed to be able to predict what the inflation rate will be 10, 15 or 20 years from now, Dr. Cobb answered "No. I'm saying, in fact, it doesn't make any difference. . . ."

The defendant railroad did not call any economist to the stand, and in final argument to the jury the railroad's counsel spent most of his time attempting to minimize the extent of the plaintiff's physical and mental problems and arguing that they were not the result of the alleged accident. Defense counsel devoted only three transcript pages of argument to the question of economic damages. Pointing out that plaintiff's actual wages in his last full year of employment had been about $16,000, counsel argued that if the jury awarded $160,000, and if plaintiff invested that amount at 10% per annum and never invaded the principal, plaintiff could receive a lifetime income of $16,000 per year and still leave $160,000 to his wife and children at his death. Plaintiff's counsel did not object to this argument.

The jury was charged by the trial court that if plaintiff were found to have been injured as a consequence of the defendant railroad's negligence, the jury should assess as damages no more and no less than the amount found, by a preponderance of the evidence, to be full, just and reasonable compensation for all of the loss so caused. Among the elements of damage the jury was told it should consider, to the extent it found them proved by a preponderance of the evidence, were "any earnings or working time lost in the past and any loss of ability to earn money in the

future. . . . " In considering any element of future damage, the trial court continued, "you are instructed that you should not take into account any possible effect [of] present . . . or future inflation one way or the other." The jury was also told that any award would not be subject to income taxes, "and you should not consider any such taxes in fixing the amount of your award. . . . "

Significantly, the jury charge did not include an instruction, requested by the defendant railroad, on reducing future earnings to present value—this despite the fact that in a colloquy outside the presence of the jury, the trial judge and counsel for both of the parties had all agreed that there must be a reduction of future earnings to present value. Counsel for the railroad did not specifically renew his request for a present value instruction after the charge had been given, but plaintiff's counsel specifically objected to the instruction that the jury "should not take into account any possible effect of present or future inflation one way or another." The court declined to change its instructions.

The jury returned a verdict for the plaintiff and against the defendant railroad, assessing the plaintiff's actual damages in the amount of $100,000. There were no special interrogatories, and the jury was not asked to state whether it found the accident had caused any disability likely to extend beyond the time of trial. The plaintiff moved for a new trial on damages, contending that the jury should not have been instructed to disregard inflation in determining future damages. The motion for a new trial was denied without opinion, and this appeal followed.

II

A claimed earnings loss of over $100,000 having already accrued by the time of trial, it may seem inherently improbable that the jury's award of damages totaling $100,000 was intended to include anything at all for loss of future earning power. The jury was not obliged to find the defendant railroad responsible for any disability that may have existed at the time of trial, of course, and if the jury intended to award nothing for loss of future earnings, it is immaterial whether instructional error might have led the jury to think the maximum allowance for loss of future earning capacity was "roughly" $1.5 million rather than $1.7 million.

Regardless of whether there were technical errors in the court's charge on the evaluation of future earning capacity, moreover, the trial judge may well have been correct in suggesting, as he did in overruling a motion by the railroad to strike the economist's testimony in its entirety, that "if the Plaintiff wishes to spread their blanket clear across the courtroom" with an obviously overblown estimate of damages, "that will be to [the defendant's] advantage ultimately." The jury may or may not have been better equipped than Dr. Cobb was to guess the course of future inflation, and the jury probably had no idea of how to go about making present value calculations itself, but it would not be surprising if the judge was reading his jury accurately when he intimated that the jury would think it absurd to award this plaintiff $1.5 million or more in respect to future earnings. The jury could have reasoned that if invested in long term tax exempt municipal bonds paying 7% per annum, for example, a $1.5 million lump sum award could be expected to yield more than

$100,000 per year and quite possibly leave plaintiff, at his death, still a millionaire (in dollars of the day), if he managed to avoid invading his capital for living expenses. In the Eastern District of Kentucky, at least, it will probably take a good many years of high inflation before most people will feel railroad hands cannot make do on less than $100,000 a year.

Still, the thought processes of juries in Eastern Kentucky are no more susceptible to divination by outside agencies than are those of juries elsewhere, and we need not rest our decision on the proposition that any instructional error committed by the trial court in this case was harmless. Given the nature of the expert testimony presented here, and in view of the court's failure to give a present value charge, we think it would have been potentially more confusing for the jury to be told it could take inflation into account than to be told otherwise.

Conceptually, to be sure, it would have been perfectly appropriate for the plaintiff's expert witness to have factored inflation (or deflation) into his future earnings estimate, if there had been some rational basis for predicting what the future inflation or deflation would amount to and when it would occur, and if the witness discounted the projected future earnings by an interest rate reflecting comparable assumptions as to the future course of the dollar. This is not what Dr. Cobb claimed to have done, of course: he admitted that he could not predict what the rate of inflation would be in the future, he said he did not take inflation into account in projecting plaintiff's future earning, and he said he did not discount those earnings to present value with the kind of interest rate likely to obtain in

a world where investors assume there is at least some risk of inflation.

If plaintiff had proffered testimony to the effect that inflation could be expected to push his earnings up for 40 years or more at a compound annual rate of more than 7% (that being the inflation rate assumed by Dr. Cobb for one relatively minor part of his economic model), such testimony might have been subject to objection—at least if plaintiff's expert wintess did not use a correspondingly high discount rate in reducing estimated future earnings to their present value. See *Petition of United States Steel Corp.*, 436 F.2d 1256 (6th Cir.1970), *cert. denied,* 402 U.S. 987, 91 S.Ct. 1649, 29 L.Ed.2d 153 (1971) and *Bach v. Penn Central Transportation Co.,* 502 F.2d 1117 (6th Cir.1974), where this court indicated that testimony projecting significant wage increases far into the future is so speculative as to be inadmissible. Even if such testimony is inadmissible, however, it is well established that the jury may normally consider the possibility of future increases or decreases in the purchasing power of money. Thus in *Bach v. Penn Central Transportation Co.,* 502 F.2d 1117, *supra,* we held that "[e]ven though no expert testimony on inflation and future increases was admitted, it was still error for the district court to charge the jury that it should not consider 'future increases or decreases in the purchasing power of money.' " *Id.* at 1122. *Cf. Morvant v. Construction Aggregates Corp.,* 570 F.2d 626 (6th Cir.), *cert. dismissed,* 439 U.S. 801, 99 S.Ct. 44, 58 L.Ed.2d 94 (1978), where we held it was reversible error to exclude expert testimony on the prospect of future wage increases.

It is equally clear, on the other hand, that the plaintiff in an FELA case is not entitled to recover more, in respect

of lost future income, than the present value of such income, and the jury ought to be so advised. *St. Louis Southwestern Railway Co. v. Dickerson,* 470 U.S. 409, 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985). To let the jury take the prospect of future inflationary wage increases into account without clear guidance on the need for reducing future earnings to their present value would be grossly unfair to the defendant.

That unfairness would be particularly striking in the case at bar, where the only inflation rate ever mentioned was 7.42%, and where the jury, unless cautioned otherwise, could have inferred it was free to project that rate into the future for a period of 40 years or more. Without a proper present value instruction, this could have led to utterly ludicrous results—particularly in view of Dr. Cobb's testimony that a rough approximation of the earning loss could be arrived at by aggregating undiscounted annual earnings. In describing that rough approximation technique, which corresponds to the "total offset" approach discussed in *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), Dr. Cobb did not intend to suggest, of course, that it would be appropriate to aggregate annual earnings after they had been adjusted upward for inflation. On the record of this case, however, Dr. Cobb having testified repeatedly that inflation made no significant difference, the jury might well have been confused by an instruction inviting it to take inflation into account.

Because of Dr. Cobb's testimony, we think it unnecessary to remand the case for a new trial in which the jury would be told both that it could take into account the possibility of future inflation and that projected future earn-

ings must be discounted to their present value. Advice from the trial court as to these two countervailing considerations would have added little or nothing to the jury's deliberations, because plaintiff's own evidence indicated that inflation in projected earnings is "washed out" by the inflation component of the interest rate used in present value calculations, and inflation therefore makes no difference in the determination of the value of future earnings. (We note also that although the "total wash-out" or "total offset" concept has not been accepted as a mandatory federal rule of decision, it is prominently featured on the menu of economic theories from which courts may currently choose in FELA cases. *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768, *supra.* The "total offset" method of calculating the present value of future earnings depends on the validity of the method's implicit assumptions as to the relationship between the future course of wage rates and the future course of interest rates, and the time may come when those assumptions will be thought so wide of the mark that the method will have to be abandoned. In the case at bar, however, there is affirmative—and uncontradicted—evidence that the assumptions are currently tenable).

A federal appellate court reviewing a challenge to jury instructions is "required to judge the charge as a whole and to affirm the jury verdict if, taken as a whole [the trial court's charge] fairly presents the law as it applies to the case at hand." *Haislah v. Walton,* 676 F.2d 208, 212 (6th Cir.1982). Taking as a whole the charge given in this case, and considering it in relation to the evidence that was before the jury, we think the judgment entered on the jury's verdict ought to be affirmed. The charge

as given would have permitted the jury to award roughly $1.5 million for future lost earnings, if the jury had taken all of plaintiff's evidence at face value, and we are not persuaded that the charge, read in the light of the testimony, entitles plaintiff to another shot at a higher verdict.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

CIVIL ACTION NO. 84-116

BURNS SCOTT HOWARD, PLAINTIFF,

VS. ORDER

(Filed November 8, 1985)

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation, DEFENDANT.

This matter is before the Court on plaintiff's motion for a new trial, and defendants response to the motion, and being sufficiently advised.

IT IS ORDERED that plaintiff's motion for a new trial is DENIED.

This 7 day of November, 1985.

/s/ Henry R. Wilhoit, Jr.
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

CATLETTSBURG CIVIL ACTION NO. 84-116

BURNS SCOTT HOWARD, PLAINTIFF,

VS.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, DEFENDANT.

JUDGMENT ON A JURY VERDICT

(Filed July 23, 1985)

This action came on for trial before the Court and a jury, Honorable Henry R. Wilhoit, Jr., Judge, presiding, and the issues having been duly tried and the jury duly rendered its verdict.

IT IS ORDERED AND ADJUDGED,

That the Plaintiff, Burns Scott Howard, recover of the Defendant, The Chesapeake & Ohio Railway Company, the sum of $100,000.00, with interest thereon at the rate of 7.60 per cent as provided by law, and his costs of action.

Dated at Ashland, Kentucky, this 23rd day of July, 1985.

LESLIE G. WHITMER
CLERK

BY: /s/ Christina M. Venoy
Deputy Clerk